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Case No: FD09P02218

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 January 2013

Before :

THE HONOURABLE MR JUSTICE BAKER

IN THE MATTER OF RAI and MI (CHILDREN)

AND IN THE MATTER OF THE SENIOR COURTS ACT 1981
AND IN THE MATTER OF THE INHERENT JURISDICTION

- -

Between :

AI	**Applicant**
- and -	
MT	**Respondent**

- -
- -

Henry Setright QC and Edward Devereux (instructed by **Dawson Cornwell**) for the **Applicant**
Marcus Scott-Manderson QC and Teertha Gupta QC (instructed by **Manches LLP**) for the **Respondent**

Hearing dates: 27th April 2012

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE BAKER

This judgment is being handed down in private on 30th January 2012. It consists of 16 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

The Honourable Mr. Justice Baker :

INTRODUCTION

1. On 27 April 2012, I made a final order in matrimonial proceedings by consent. Ordinarily, such an order would not be accompanied by any judgment. In this case, however, the lawyers for the parties, hereafter referred to as the father and mother, have suggested that I depart from that course because of the very unusual circumstances by which the consent order was agreed, namely an arbitration carried out by rabbinical authorities. This is not, therefore, a judgment in the conventional sense of an exposition of the reasons for the court's decision on the substantive issues, but rather an explanation of the court's approach to the process of arbitration chosen by the parties as the means to resolve those issues.

2. At the outset, I wish to acknowledge the very great assistance which the parties, and the court, have received from the lawyers instructed in this case - Henry Setright QC and Edward Devereux, and Anne-Marie Hutchinson of Dawson Cornwell, for the father, and Marcus Scott-Manderson QC and Teertha Gupta QC, and James Stewart of Manches LLP, for the mother.

BACKGROUND

3. The father was born in 1983 and is therefore now aged 29. He is a Canadian citizen. His parents live in Toronto in Ontario. The mother was born in 1986 and is therefore now aged 26. She is a British citizen. Her parents live in London. Both parties are observant orthodox Jews and come from well-respected and relatively wealthy families. The parties met in June 2005 and married in a Jewish religious ceremony in London on 29 August 2006 and a civil ceremony in Toronto on 23 October of that year. After their religious marriage ceremony, the parties moved to Israel so that the father could complete his religious studies. In October 2006 they travelled to Toronto for their civil marriage ceremony before returning to Israel. In the months that followed, they visited a number of different places. By that point, the mother was pregnant and in August 2007 she travelled to London where she gave birth to her first daughter, A, on 23 September. The parties then returned to Israel in November 2007.

4. In the late summer of 2008, the parties began to make plans to move to Canada, principally so that the father could work in his father's business in that country. They travelled to Canada in January 2009 to attend a family wedding. During that trip they viewed four properties in Toronto and selected one before returning to Israel. By then, the mother was pregnant with her second child. In February 2009, the parties finalised their plans to leave Israel and move to Canada. Places were sought for A at schools in Toronto and the parties' belongings were shipped from Israel to Canada in no fewer than 231 boxes. On 24 February, the parties themselves left Israel, coming to London initially so that they could attend the mother's sister's wedding and celebrate Passover with the mother's parents. While the mother stayed with her parents, the father made some trips to America and Canada. It had been agreed by the parties that they would finally travel to live in Toronto on 20 April 2009.

5. By that stage, however, there were difficulties in the marriage. On 19 April 2009, the parties had an argument after which the mother and her father visited a rabbi. The mother's case is that, following the argument and against the background of the

difficulties that had arisen, she decided not to go to Toronto as planned on the 20th. However, after an exchange of e-mails between the parties, the mother and A travelled to Canada on 26 April. The mother's case was that she was only intending to travel to Canada for a limited period to try to effect a reconciliation with the father. His case, on the other hand, was that her arrival in Canada was the start of the implementation of their joint plan to move there indefinitely. Once in Canada, the parties stayed with the father's parents for several weeks while their own property was being refurbished.

6. Ten weeks later, on 28 June, travelling on return tickets booked in conjunction with the father, the mother and A flew to London so that the mother could, as agreed, give birth to her second child in this country. It is the mother's case that she had by this stage concluded that the marriage had effectively broken down and she would not return to Canada, although it was clear that she did not inform the father about her decision at this stage. The father duly followed on 22 July so that he could be present at the birth of the child, M, a second daughter, who was born the following day. Thereafter, the father returned to Toronto on 28 July. It seems that the return tickets for the mother and A had been booked for 17 August. In the event, the mother did not return on that date, choosing instead to travel to the South of France. About this time she informed the father by e-mail that she was not returning to Canada. He came back to London on 30 August and spent some time with the children, before returning to Canada on the 2 September. At this point he took legal advice and on 16 September he initiated a process in Canada for an application under the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

7. On 28 September the father returned to London again. The mother asserted that the father and his mother attempted to remove A from her care. As a result, on 3 October, the mother applied in the Principal Registry for a prohibitive steps order against the father. An ex parte application that day was refused but at an adjourned hearing on 2 October, District Judge Berry duly granted the order. On the same day, the mother was served with the father's application under the Hague Convention which had come before Eleanor King J on a without notice basis that day at a hearing at which the learned judge had made the usual range of orders, including a location order incorporating a passport order and a port alert. After two further interim hearings, the Hague application was listed for a final hearing on 7 December but unfortunately no judge was available to hear it on that date and so further directions were made adjourning the case to 8 February 2010 with a time estimate of five days. The matter was duly listed before me for hearing that week. On the face of the documents, the principal issue to be determined in the proceedings was the habitual residence of the parties and the children.

8. In the weeks leading up to the hearing in February, however, there were extensive negotiations between the parties. Those negotiations culminated in an agreement between the parties that they would explore the possibility of entering a process of alternative dispute resolution overseen by a body described for the purposes of these proceedings as the New York *Beth Din*. On Tuesday 2 February, Pauffley J made an order, commonly known as a "safe harbour" order, permitting the mother to travel to the United States with M for the purpose of participating "in rabbinical negotiations in New York over all aspects of the marital break-up during the week commencing 1 February 2010" and then return with M to this country, the father undertaking not to

interfere with the freedom of movement of the mother and M to enter the USA and return to England and Wales. The tipstaff order was varied to permit the travel of the mother and M to New York, on the basis that upon their return to this country the passports would be lodged with the mother's solicitors and the injunctive elements of the said tipstaff order, namely the port alert, reinstated until further order.

9. Pursuant to this agreement and following the court order, the mother and M duly travelled to the United States to enable the mother to participate in negotiations under the auspices of the rabbinical authorities in the New York *Beth Din*, A remaining in this country with her maternal grandparents in their home in North London.

10. As a result of those negotiations, the parties reached an agreement, not at that stage about the substance of the issues between them, that is to say issues concerning the children's welfare, financial matters and the obtaining of the religious divorce (the Get), but rather about the process they wished to follow thereafter to attempt to resolve those issues. Specifically, they agreed that they would refer all the disputes between them to arbitration by a senior rabbi, Rabbi Geldzehler of the New York *Beth Din*.

11. At the start of the hearing on 8 February an agreed order was put before me providing for the dismissal of the proceedings for summary return of the children on the basis of an order reciting the agreement reached by the parties as to the process to be followed. In particular, the order recited that the parties were agreeing "to enter into binding arbitration before Rabbi Geldzehler" and undertaking to "seek and abide by any determination of the family issues through binding arbitration before the New York *Beth Din*" and specifically asserting that they "both shall be bound by any award made in the New York *Beth Din*." In addition the draft provided that the parties were giving those (and other) undertakings "voluntarily and on legal advice that such undertaking shall be fully enforceable in the courts in England and Wales in respect of any application for committal and shall be binding and enforceable upon the parties in the courts of Ontario and worldwide".

12. At the outset of the hearing, however, I indicated to the parties that I did not consider the terms of the draft order to be lawful. In particular, they flouted the principle that the court's jurisdiction to determine issues arising out of the marriage, or concerning the welfare and upbringing of the children, cannot be ousted by agreement. On the other hand, having regard to the parties' devout religious beliefs and wish to resolve their dispute through the rabbinical court, and acknowledging that it always in the interests of parties to try to resolve disputes by agreement wherever possible, including disputes concerning the future of children and ancillary relief of the breakdown of a marriage, I indicated that the court would in principle be willing to endorse a process of non-binding arbitration. Before doing so, however, I requested further information as to the principles and approach to be adopted by the rabbinical authorities to resolving disputes, in particular as to the care of the children. The matter was then adjourned to later in the week. At that point, further information was supplied to the court, in particular a wider range of English legal authorities, together with written material setting out the principles applied by orthodox rabbinical authorities to the resolution of matrimonial disputes, and a short letter from the New York *Beth Din* replying to a joint letter from the parties' solicitors outlining the approach which would be followed by Rabbi Geldzehler.

13. Of the written material, I was particularly assisted by an article provided by Mr. Setright QC and Mr. Devereux on behalf of the father entitled "The Collision of Church and State: A Primer to *Beth Din* Arbitration and the New York Secular Courts" (Ginnine Fried, Fordham Urban Law Journal 2003 – 2004, pp. 633 – 656.). outlining the history of the adjudication of disputes by *Batei Din* between Jews in accordance with *halacha* (Jewish law) and the interaction between *Beth Din* adjudications and the secular courts, and by an article by Rabbi Michael J Broyde entitled "Child Custody in Jewish Law; a Conceptual Analysis" (Journal of Halacha and Contemporary Society, vol XXXVII, p21), concerning the approach of the rabbinical law to child custody disputes. From the latter, I cite the following:

> "There are two implicit basic theories used in Jewish Law to analyse child custody matters and different rabbinic decisors are inclined to accept one or the other… one theory grants parents certain rights regarding their children while also considering the interests of the child while the other theory focuses nearly exclusively on the best interests of the child… "

According to Rabbi Broyde, the *Beth Din* of America is more inclined to accept the latter approach. The article also discussed the relationship between the rabbinical rules and the secular law.

> "On a practical level it is very common that a *Beth Din* can enforce their decisions concerning child custody in the United States only when secular courts permit them to be enforced. While in most areas of commercial law secular courts will honour the ruling of a *Beth Din* when there is a binding arbitration agreement, even if the result is different from that which would be reached under secular law, such is not the case in child custody rulings as secular courts review de novo all child custody determinations. Thus it is very common for the losing party in a child custody determination to appeal to the secular courts to overturn the ruling of the *Beth Din*… The courts additionally have had the role of parens patriae, or super parent, in protecting the best interests of the child in marital disputes. Thus courts either have rejected the use of arbitration for child custody disputes or have only upheld child custody awards if they are in the best interests of the child. The child custody award of a *Beth Din* will be reviewed completely if one parent or guardian so requests where the award of the *Beth Din* is accepted as evidence by the court. While de novo review does not necessarily mean that an arbitration award will be vacated by the court, the *Beth Din*'s award is subject to a great deal of scrutiny by the court. Essentially the courts will show some deference to the original arbitration award, but use their independent judgment to determine whether to uphold the award."

14. At my request solicitors for the parties wrote to Rabbi Horowitz of the New York *Beth Din* asking certain questions (a) about the principles that Rabbi Geldzehler would apply when considering matters concerning the children in this case, (b) whether he will be able to perform a Get that would be recognised elsewhere, and (c)

the status of any arbitration award. I am very grateful to Rabbi Horowitz for his prompt rely from which I quote the following passages:

> "At our *Beth Din* the rabbis follow Halacha in connection with resolving child custody disputes such as the one you describe. In conjunction with Halacha the best interests of the children are the primary consideration in resolving cases like this. Procedurally Rabbi Geldzehler will hear the positions of both parties in person before any decision can be rendered… Rabbi Geldzehler is authorised to perform Geteen (Jewish divorces) at the rabbinical court of our base *Beth Din* and all the Geteen performed therein are acceptable by all rabbinical courts and orthodox synagogues around the world… the Pasak (arbitrators' award) of Rabbi Geldzehler is recognised by all rabbinical courts… Both parties sign an arbitration agreement to submit to binding arbitration all the controversies between the parties, which also states that "the parties submit themselves to the personal jurisdiction of the Court of the State of New York and/or New Jersey and/or in any court of competent jurisdiction for any action or proceeding to confirm or enforce a decree of the arbitrators pursuant to article 75 of the New York civil practice law and rules." Although the matters of child custody and visitation are not legally binding in the New York state courts, most arbitration awards regarding child custody and visitation are recognised by the courts and gets the judges' seal of approval."

15. In the light of this further material, I indicated that I would endorse the parties' proposal to refer their disputes to a process of arbitration before the New York *Beth Din* on the basis that the outcome, although likely to carry considerable weight with the court, would not be binding and would not preclude either party from pursuing applications to this court in respect of any of the matters in issue.

16. Following further negotiations and argument, an order was made in the following terms:

> UPON the parties agreeing and the court recording that in any event the decision of "The New York *Beth Din*" [defined as meaning a *Beth Din* in New York presided over by Rabbi Geldzehler concerning where and with whom the children shall reside will be placed before this court for its consideration pursuant to undertaking (4) below …
>
> AND UPON the father undertaking to issue and file an originating summons under the inherent jurisdiction forthwith so that, for the avoidance of doubt, the children both remain subject to the inherent jurisdiction of England and Wales save in respect of a summary return
>
> AND UPON the court declaring and the parties acknowledging that (1) nothing in this order ousts the jurisdiction that this court may have to determine issues arising out of the marriage between the parties and/or concerning the children, and (2) if required to exercise such jurisdiction the

court will give appropriate determination of any arbitration pursuant to the arrangements set out below

AND UPON the parties agreeing to enter arbitration: (1) before … The New York *Beth Din* … (2) that their intention is to abide by the determination of that arbitration; (3) but they each retain the right not to abide by the determination of that arbitration in the event that it is (a) plainly unfair, or (b) contrary to the welfare of the children

AND UPON the parties inviting the court to make the orders set out below and to accept the undertakings

AND UPON the parties giving the undertakings set out in the schedule below, they agreeing and understanding, voluntarily and on legal advice, that such undertakings shall be fully enforceable before the courts of England and Wales in respect of any future application for committal and shall be binding and enforceable upon the parties in the Courts of Ontario and worldwide, subject to the domestic internal law of the relevant State

AND, without prejudice to any determination in The New York *Beth Din*, upon the father and the mother agreeing in respect of the Hague Convention 1980 and the summary return proceedings under the inherent jurisdiction of the High Court: (1) that the father agrees that the children shall not be summarily returned to Ontario Canada whether pursuant to the Hague Convention 1980 or the inherent jurisdiction of this Court … (2) the father agrees accordingly to the immediate and permanent cessation of any application in respect of summary return of the children to Ontario in respect of the asserted removal and retention of the children as set out in the originating summons dated 2nd October 2009; (3) that the father will not seek to make any further application worldwide for the summary return of the children pursuant to the Hague Convention 1980

AND UPON the parties agreeing that the recital provided above and paragraph 1 below shall not in any way prevent the children being returned to Canada or remaining in Enland on a long term basis if that is part of a determination of The New York *Beth Din*

AND UPON the court not making any finding of fact as to either the parties' or the children's habitual residence

AND FURTHER to the order of today's date granting the mother safe passage with the children to and from the USA to attend arbitration before The New York *Beth Din* ….

BY CONSENT, IT IS ORDERED that

(1) The father's application for the summary return of the children to Ontario Canada (a) pursuant to the Hague Convention 1980 and (b) under the inherent jurisdiction of the High Court be dismissed.

(2) The children be made wards of this court during their minority or until further order.

(3) [Provisions as to passports]

(4) [Provisions as to disclosure of the order]

(5) Any future applications relating to this order reserved to Baker J.

(6) [Provisions as to future listing]

(7) No order as to costs

SCHEDULE OF UNDERTAKINGS

The father and the mother agree that the undertakings herein are provided for the purpose of achieving a settlement of the following matters (set out below) in issue between the parties, such settlement to be determined by The New York *Beth Din*, both parties having been advised by their legal representatives about, and understand the consequences of a failure to comply with the undertakings that they provide below:

AND UPON the father and the mother both freely and voluntarily undertaking to this court the following and accepting to be bound by the undertakings herein in this court, the courts of Ontario and all courts worldwide (the father and the mother agreeing that these undertakings shall not be relied on to found jurisdiction in the courts of England and Wales or Ontario or any other court worldwide save for The New York *Beth Din*, and save as to questions of enforceability of such undertakings):

(1) As soon as possible to attend and participate in The New York *Beth Din*

(2) That they agree that the arbitration in the New York *Beth Din* shall consider and make determination as to the following matters: (a) where and with whom the children will reside and for what amounts of time; (b) all financial issues; (c) the jurisdiction in which the civil divorce will proceed on an uncontested basis; (d) any issues relating to the father granting the mother a Get.

(3) That they shall both proceed expeditiously in seeking a determination by arbitration in The New York *Beth Din*.

(4) That they will each following the determination of the said arbitration expeditiously apply to convert any determination of the arbitration in The New York *Beth Din* (a) in so far as it deals with where and with whom the children shall reside into orders of this court and in such other jurisdiction as may be directed by Rabbi Geldzehler; (b) in so far as it deals with all other matters into orders of this court and/or in such other jurisdiction as may be directed by Rabbi Geldzehler, and in the event that the Rabbi does not nominate a jurisdiction, the parties are released from their undertaking at (5) below.

> (5) That they will each expeditiously obtain an indefinite stay of all other proceedings taken by them against the other in respect of all matters relating to themselves and the children in the courts of Ontario and England and Wales and save in an emergency will not bring any fresh proceedings worldwide, save (a) to reflect as may be necessary the determination of the said arbitration of The New York *Beth Din* on the basis that neither will seek costs against the other of obtaining such stay, and (b) to facilitate and enforce the safe passage of the mother and the children to and from New York.

17. The parties duly and promptly embarked upon an arbitration process with the New York *Beth Din*. Both parties, their lawyers and indeed the court had envisaged that the process would be completed within a matter of weeks, but in the event it took far longer. The issues covered included not merely the future of the children but also the parties' finances, and the granting of a get. This led to an urgent problem about contact. The mother had travelled to New York with the younger child M (protected by the "safe harbour" clause) leaving the older child A with maternal grandparents in England. Thus the father was able to have contact with M but not A. With the arbitration process in New York unresolved, it became necessary to consider the interim arrangements for contact, initially over Passover, pending a final determination. The determination of those interim arrangements proved to be a difficult and thorny issue. Ultimately however, the matter was referred to the New York *Beth Din* which ordered that the father should have staying contact in Canada for five nights immediately following Passover. This placed the mother in a difficult position. As a practising and devout orthodox Jew who agreed to the arbitration process, she felt constrained for religious reasons to accept what the *Beth Din* had determined. Equally, however, as a mother she felt concern and anxiety in respect of her daughter's welfare. The question of interim contact was therefore referred to me for an urgent telephone hearing.

18. Having heard (unsworn) evidence from both parties, and noted in particular assurances given by the father as to the arrangements for the care of A during the proposed contact visit and undertakings offered to ensure her return to this country at the end of the visit, I made an order that the father should be permitted to take A to Canada for contact for five days, in line with the determination of the New York *Beth Din*. In a short judgment, I said inter alia:

> "I make this decision on the basis of the welfare of A which is my paramount consideration. In the 12th February order the Court declared that in exercising its jurisdiction in respect of the children it would give appropriate consideration to any arbitration made by the New York *Beth Din*. In this case I am satisfied that the New York *Beth Din* has had the opportunity to consider all the points made by the mother today, who had representation at the *Beth Din*. I do attach weight to the *Beth Din*'s decision. However, if I were independently of the view that it was not in the child's best interests I would unhesitatingly say so and refuse to order it, notwithstanding the very great respect this Court has for the deliberations of the *Beth Din*."

19. A duly went to Canada for contact over Passover 2010 and was returned in accordance with the father's undertakings. Thereafter, the process before the New York *Beth Din* continued. I listed a succession of review hearings hoping for a conclusion of the process, but on each occasion I was informed that there was no resolution. Sometimes the parties would simply apply for the hearing to be taken out of the list. On other occasions counsel would attend and reassure me that the process was continuing, that the situation had reached a delicate stage and it would be undesirable for the court to interfere. Mindful of the need to respect the parties' devout wish to utilise the *Beth Din*, and reassured that the children's interim position was satisfactory and that the court retained ultimate control, I refrained from any intervention.

20. In passing, it is illuminating to note two developments in English matrimonial law and practice that have occurred during the currency of the arbitration process in this case. First, the Family Procedure Rules 2010 came into force, incorporating for the first time into family proceedings an "overriding objective" to deal with a case justly, meaning, inter alia, ensuring that it is dealt with expeditiously and fairly, in ways that are proportionate with the nature, importance and complexity of the issues, and saving expense. Under rule 1.4, the court is under an obligation to further the overriding objective by actively managing cases including, inter alia, encouraging the parties to use an alternative dispute resolution ("ADR") procedure if the court considers that appropriate and facilitating the use of such procedure. Part 3 of the Rules sets out the court's powers to encourage and facilitate the use of ADR and provides inter alia that the court may adjourn the proceedings at any stage for such specified period as it considers appropriate to enable ADR to take place.

21. Secondly, a scheme for arbitration in family financial proceedings was developed and finally launched in February 2012 by the Institute of Family Law Arbitrators, whose stakeholders include Resolution and the Family Law Bar Association. This is not the place to consider the components and merits of the scheme, which are fully described by my former colleague Sir Peter Singer in two recent articles to be found at [2012] Fam Law 1353 and 1496. Suffice it to say that the scope for arbitration in matrimonial finance cases has expanded significantly during the currency of these proceedings. It should be noted, however, the scope of the IFLA scheme does not extend to questions concerning the status of individuals or of their relationship, or the care or parenting of children.

22. It was not until September 2011, some 18 months after the case had been adjourned, that the New York *Beth Din* eventually handed down its ruling on the arbitration. The award covered all issues between the parties, financial and child-related. Even then, there were further negotiations between the parties, and it was not until the Spring of 2012, some two years on from the original hearing, that the outstanding issues were resolved and the matter was brought back before me for final consideration.

23. There was, furthermore, one remaining impediment. Under Jewish law, it was necessary for the father to give the Get. Within orthodox Jewish culture, great social stigma attaches to a woman who is separated from her husband but has not been granted a Get. Such a woman is traditionally called an "agunah", meaning "chained". For this reason, the mother was unwilling to agree to the complex provisions of the arbitration award unless the Get was given. Equally, the father was unwilling to agree to give the Get until the court had approved the award and indicated that it would

agree to its terms being incorporated in a court order. The solution arrived at by the parties was for the court to convene a hearing, consider the terms of a draft order based on the arbitration award and, if so minded, indicate that it would be prepared to make the order in the best interests of the children, whereupon the father would forthwith attend at the London *Beth Din* with the mother and go through the lengthy ceremony for the giving of the Get. The parties' lawyers acknowledged that this course was unusual, but emphasised that it provided the father with the security of knowing that the order had been approved by the court before giving the Get and that the order would be automatically sealed without any further substantive hearing if the Get was granted, and the mother would be safe in the knowledge that the order would not be finalised and sealed unless and until the Get was given, and that if the Get was not given, she would have an opportunity to return the matter to court and seek alternative orders. I indicated that I agreed with this proposed course. A hearing was accordingly arranged one morning, with an appointment at the *Beth Din* in the afternoon. Having considered the draft order, I indicated that I would be prepared to make the order later in the day. The parties duly attended at the *Beth Din* and the Get was given, and at the end of the day I duly made the order.

24. The final order runs to some 17 pages and over 4,300 words. Covering as it does many minutiae of the arrangements for the children, it is unnecessary and inappropriate to recite it verbatim in this judgment. In summary, however, it contains the following provisions. The wardship was discharged and a residence order made in favour of the mother in respect of both children. Further orders made "for the avoidance of doubt" provided that both parents should have parental responsibility for the children, and that the mother should inform the father about, consult with him about, and permit him to co-decide upon significant matters relating to the children's welfare and upbringing, including medical, religious, and education matters. Further paragraphs contained detailed provisions for contact between the father and the children, including staying contact "in Toronto or elsewhere", monthly staying contact in London in those months when there was no staying contact overseas, telephone and skype contact, and additional arrangements for "family celebrations" ("celebration" defined as meaning "a wedding" or a " Bar Mitsvah", and "family" defined as the father, his brother, sisters, and the children's first cousins and any half siblings that the children may have) and religious festivals. The order further contained a schedule containing the New York *Beth Din* award and a further schedule setting out the terms of an agreement between the parties following, and in accordance with, the final award of the New York *Beth Din* which included provisions as to the granting of the get and the financial settlement between the parties.

25. The order also included a number of recitals including:

    (1) that the order was agreed between the father and the mother following, and in accordance with, the final award of the New York *Beth Din* dated 19th September 2011;

    (2) that, insofar as there were differences between the final award of the New York *Beth Din* and the terms of this order, in respect of matters of substance and matters of interpretation, the terms of this order were to be preferred;

(3) that the court had not seen any financial disclosure but that such disclosure had been given to the New York *Beth Din*;

(4) that the parties agreed and accepted that the financial agreements set out in the schedule may be contrary to legal advice from their English solicitors, their respective barristers having not been instructed to provide any advice on the financial matters set out below;

(5) that the parties agreed, and the court declared, that the courts of England and Wales were the jurisdiction for enforcement of the terms of the order; and

(6) that the agreements represented settlement of matters between themselves following the breakdown of the parties' marriage, including matters relating to the exercise of parental responsibility in relation to, and matters in respect of the welfare of, the children, and all claims between the parties of a financial nature arising out of the marriage, and neither party would commence or pursue any other proceedings arising out of this marriage in this jurisdiction or elsewhere save for proceedings for a civil divorce.

DISCUSSION

26. In considering the parties' proposals to refer the dispute to arbitration, the following legal principles were of particular relevance.

27. First, insofar as the court has jurisdiction to determine issues arising out of the marriage, or concerning the welfare and upbringing of the children, that jurisdiction cannot be ousted by agreement. The parties cannot lawfully make an agreement either not to invoke the jurisdiction or to control the powers of the court where jurisdiction in invoked: see Lord Hailsham in *Hyman v Hyman* [1929] AC 601.

28. Secondly, save where statute provides otherwise, when considering issues concerning the upbringing of children, it is the child's welfare that is the paramount consideration. Statute does otherwise provide in respect of applications for the summary return of children under the Hague Convention. Applications for summary return under the inherent jurisdiction, on the other hand, are to be determined by reference to the child's welfare, for the reasons explained by Baroness Hale of Richmond in *In re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80 at paragraph 25:

> "In all non-Convention cases the courts have consistently held that they must act in accordance with the welfare of the individual child. If they did decide to return the child, that is because it is in the best interests to do so not because the welfare principle has been superseded by some other consideration."

29. Thirdly, this court gives appropriate respect to the cultural practice and religious beliefs of orthodox Jews as it does to the practices of all other cultures and faiths. But that respect does not oblige the court to depart from the welfare principle because, as explained by Baroness Hale in *Re J* at paragraphs 37 to 38, the welfare principle is sufficiently broad and flexible to accommodate many cultural and religious practices:

> "It would be wrong to say that the future of every child who is within the jurisdiction of our courts should be decided according to a conception of child welfare which exactly corresponds to that which is current here. In a world which values difference, one culture is not inevitably to be preferred to another. Indeed we do not have any fixed concept of what will be in the best interests of the individual child… We are not so arrogant as to think that we know best… Hence our law does not start from any a priori assumptions about what is best for any individual child. It looks at the child and weighs a number of factors in the balance, now set out in the well known checklist in section 1 (3) of the Children Act 1989: These include his own wishes and feelings, his physical and emotional and educational needs, and the relative capacities of the adults around him to meet those needs, the effect of change, his own characteristics and background, including his ethnicity, culture and religion, and any harm he has suffered or risks suffering in the future. There is nothing in those principles which prevents a court from giving great weight to the culture in which a child has been brought up when deciding how and where he will fare best in the future. Our own society is a multi-cultural one."

30. Fourthly, it is always in the interests of parties to try to resolve disputes by agreement wherever possible, including disputes concerning the future of children and ancillary relief of the breakdown of a marriage. As Thorpe LJ observed in *Al Khatib v Masry* [2004] EWCA Civ 1353 [2005] 1 FLR 381 at paragraph 17:

> "there is no case, however conflicted, which is not potentially open to successful mediation, even if mediation has not been attempted or has failed during the trial process"

In international child abduction cases, the charity Reunite, has run a highly successful mediation scheme for a number of years. It is important to add, however, that, whilst the court will encourage parties to try to resolve disputes by agreement, and will permit parties fully to participate in any process designed to achieve an agreed settlement, including where appropriate a process established by the culture or faith to which they belong or adhere, it must be careful to avoid endorsing any process that has or might have the effect of ousting the jurisdiction of the court, particularly (but not exclusively) in respect of the welfare of children.

31. At the date of my order in February 2010, there was no precedent for referring a matrimonial case for arbitration. Mediation was well established but, as Mr Setright QC and Mr Devereux submitted on behalf of the father, "mediation is, of course, a very different animal to arbitration and although it has been widely called for no family law arbitration scheme currently exists in England and Wales." In their attempts to persuade the court to permit the parties to resort to arbitration in this case, Mr. Setright and Mr. Devereux drew my attention to an article by Thorpe LJ, "Statutory Arbitration and Ancillary Relief" in [2008] Family Law, in which he said inter alia (at page 28) "to extend the Arbitration Acts to reach all financial issues created by the breakdown on relationships is surely safe territory." Since then, as set out above, the Rubicon has been crossed and an arbitration scheme in matrimonial

finance cases is now established. The rule in ***Hyman*** prevents the arbitration award being binding, although it has been suggested by its proponents that an award should amount to a "magnetic factor" in any subsequent analysis of the issue by a court. In the eloquent words of Sir Peter Singer (at [2012] Fam Law 1503), "an arbitral award founded on the parties' clear agreement … to be bound by the award should be treated as a lodestone (more than just a yardstick) pointing the path to court approval."

32. It is said that arbitration has many attractions for divorcing couples, including speed, confidentiality and cost. In addition, the parties are able to select the arbitrator as opposed to litigation where the parties are obliged to accept the judge allocated to hear the case. In this respect, it can be argued that arbitration is in line with the principle underpinning the Children Act 1989 that primary responsibility for children rests with their parents who should be entitled to raise their children without the intrusion of the state save where the children are suffering, or likely to suffer, significant harm. That principle in turn is in line with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the right to respect for private and family life, and the concept of personal autonomy which underpins that right. In short, it is up to parents to agree how their children should be brought up and, if they cannot agree, they should be entitled to choose how their disagreement should be resolved without state intervention, unless either (a) one or both parents invoke the help of the court or (b) the children are suffering or likely to suffer significant harm as a result of their parents' actions.

33. There are three further features of the process that warrant further comment. First, it was an integral aspect of the process of arbitration that it took place under the auspices of the *Beth Din*. It was a profound belief held by both parties, and their respective extended families, that the marriage which had been solemnised in accordance with the tenets of their faith should be dissolved within those tenets. As Ms Fried observes in the article cited above, "interpretation of the Talmud suggests that an obligation to utilize a Jewish forum to adjudicate disputes still exists." In this case, having been reassured as to the principles which would be applied by the rabbinical authorities, which so far as the children were concerned were akin to the paramountcy principle on which English children's law is based, the court was content to accept and respect the parents' deeply-held wishes, subject to the proviso that the outcome could not be binding without the court's endorsement. It does not, however, necessarily follow that a court would be content in other cases to endorse a proposal that a dispute concerning children should be referred for determination by another religious authority. Each case will turn on its own facts.

34. Secondly, it was a notable feature of this litigation, and the process before the *Beth Din*, that each parent benefited from the support of their extended families. I am not referring to financial support, although I anticipate that each party has received very considerable financial assistance, but rather to the emotional support exemplified by the presence at court on nearly every occasion of several members of the respective extended families. On at least one occasion, all four of the grandparents of A and M were, with my permission, present in court. Their presence and involvement was not only (so far as I was able to discern) beneficial to the parties, but also served to underline the strength of the parties' family identity as a component of their faith.

35. Thirdly, at a time when there is much comment about the antagonism between the religious and secular elements of society, it was notable that the court was able not

only to accommodate the parties' wish to resolve their dispute by reference to their religious authorities, but also buttress that process at crucial stages – by adjourning the case for arbitration; by using wardship as a protective mechanism for the children pending the outcome of the arbitration; by making the "safe harbour" orders that enabled the mother to travel to New York with M for the purpose of taking part in the process; by holding an emergency interim contact hearing; and by giving provisional approval of the draft final order to facilitate the granting of the Get. In this respect, this case illustrates the principle propounded by Archbishop Rowan Williams in his 2008 lecture "Civil and Religious Law in England: a Religious Perspective" (cited by Mr. Setright QC and Mr. Devereux) that "citizenship in a secular society should not necessitate the abandoning of religious discipline, any more than religious discipline should deprive one of access to liberties secured by the law of the land, to the common benefits of secular citizenship".

36. In submissions prepared for the final hearing, Mr. Teertha Gupta QC on behalf of the mother observed: "In the instant case the parties were entrenched in international litigation involving four sets of proceedings in two different countries. It was submitted and accepted … that a global approach to an alternate means of dispute resolution, with the proviso that it cannot be enforced without a court order which would have to be obtained from this court, sitting in a welfare-based jurisdiction, should be supported and encouraged by the (overburdened) court system". I respectfully agree.

37. It was for those reasons that I supported and facilitated the parents' proposal to refer their dispute to non-binding arbitration and subsequently endorsed the outcome of that process concerning both children and financial arrangements. I consider that the resolution of the issues between the parties by this process was largely in accordance with the overriding objective of the Family Procedure Rules 2010. I have some concern about the delays in the process, and thus question whether it can be said that the case was dealt with "expeditiously". I have no information as to the costs incurred by the parties. But overall it was, I think, fair and proportionate. So far as the children were concerned, the outcome achieved by the *Beth Din* award, as refined subsequently by the parties through further negotiation and agreement, was manifestly in the interests of their welfare. It was unnecessary for the court to embark on any lengthy analysis of welfare issues. So far as the financial settlement was concerned, the terms of the agreement were unobjectionable. The parties' devout beliefs had been respected. The outcome was in keeping with English law whilst achieved by a process rooted in the Jewish culture to which the families belong.